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RE: NOI Comments in GN Docket No. 00-185; FCC No. 00-355.

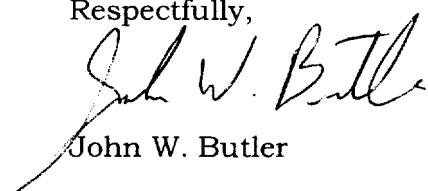
Dear Ms. Salas:

Enclosed is one original and four copies of the Comments of EarthLink, Inc. in the above-referenced matter.

A 3.5 inch diskette will be submitted to Janice Myles, Common Carrier Bureau.

Copies have also been provided to the parties listed below.

Respectfully,


John W. Butler

cc: Johanna Mikes, Common Carrier Bureau
Christopher Libertelli, Common Carrier Bureau
Carl Kandutsch, Cable Services Bureau
Douglas Sicker, Office of Engineering and Technology
Robert Cannon, Office of Plans & Policy
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Before the
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In the Matter of

Inquiry Concerning High-Speed
Access to the Internet Over
Cable and Other Facilities

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GN Docket No. 00-185

COMMENTS OF EARTHLINK, INC.

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EXECUTIVE SUMMARY

EarthLink, Inc. ("EarthLink") is the nation's second-largest Internet service provider ("ISP"), and the largest that is not under current or proposed common ownership with a cable company. Especially in light of the Commission's release on October 31, 2000, of data showing that cable-based services make up 84% of the broadband Internet access market, Earthlink commends the Commission for initiating this proceeding to address the critical issue of cable open access.

1. The Most Important Question Before The Commission Is Whether Cable Modem Service Is A "Telecommunications Service" or A "Cable Service."

At the heart of the "cable open access" debate is whether the service that the NOI calls "cable modem service" is a "telecommunications service" regulated under Title II of the Communications Act, as amended ("the Act"), or a "cable service" regulated under Title IV of the Act. Before determining which definition applies, it is necessary to define the service being considered. The Commission has adopted the term "cable modem service" to describe the service examined in this proceeding, and EarthLink uses this term as well in its comments. What we mean by "cable modem service" is the cable-based transport service necessary to deliver the information service commonly referred to as "Internet access." The Ninth Circuit Court of Appeals' explanation of the two services involved in "Internet access" is as succinct as any:

Like other ISP's, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline.¹

¹ *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).

The “cable modem service” that EarthLink addresses in these comments consists of only the transmission element related to Internet access.

i. Cable Modem Service Is Not A Cable Service.

Cable modem service cannot be a “cable service” because “cable service” is defined as the “one way transmission” of “video programming” or “other programming service.”² As the *Portland* decision and common sense make plain, the Internet is not a “one-way” proposition. The very essence of the medium is that it is fully interactive, and that the users, not the access providers, are the creators of the information that flows over the Internet. Moreover, even if the “one-way” definition of cable service in the Act did not conclusively preclude the inclusion of cable modem service within the definition of “cable service,” the definitions of “video programming” and “other programming service” certainly do.

No party contends that cable modem service is “video programming,” i.e., programming that is comparable to television broadcast programming. Neither is it plausible to argue that cable modem service is an “other programming service,” because the definition of that service specifies that it consists of “information that a cable operator makes available to all subscribers generally.” Perhaps the most defining characteristics of the Internet are that it is interactive and that the information transmitted is created and selected by the users, not the provider of access. Put simply, cable modem service does not satisfy a single element of the statutory definition of “cable service.”

² 47 U.S.C. § 522(6).

Despite the fact that cable modem service cannot meet the statutory definition of “cable service,” the Commission has not yet formally ruled that cable modem service is not a cable service, although it has suggested as much in its *amicus* brief to the *Portland* court. The only reason for the Commission’s failure so far to acknowledge the plain language of the Act appears to be an argument put forward by cable interests that the insertion by the Telecommunications Act of 1996 of the words “or use” into the definition of “cable service” somehow expanded that definition to cover Internet access. In making this argument, the cable industry does not appear to argue that the insertion of these words by itself in any way changes the meaning of the terms “one-way,” “video programming,” or “other programming service.” Instead, proponents of this theory rely on a single, ambiguous line from the legislative history as the sole support for their argument. Through the sheer force of poker-faced repetition by its proponents, this argument has survived to such an extent that it is even included in the NOI.

EarthLink respectfully yet forcefully urges the Commission to state once and for all that the “or use” argument is without merit. Because the statutory language so clearly does not include cable modem service within the definition of “cable service,” the “or use” argument, which is grounded entirely on a misconstruction of legislative history, should not even be reached. Even if it is considered, however, the single sentence of the legislative history relied upon by the cable industry is completely overwhelmed by the rest of the legislative history of the Telecommunications Act of 1996. Specifically, numerous cable industry representatives -- including Mr. Gerald Levin of Time Warner and Mr. Decker Anstrom of the National Cable Television Association -- testified at

length before Congress about the issues on which the cable industry sought relief. None of those issues was even remotely related to the present meaning of the words “or use,” an especially glaring contradiction in light of the attention that the “or use” argument has received. In fact, there is nothing whatsoever in the record to indicate that the cable industry or Congress thought that transmission services used for providing Internet access, or other two-way information services provided over cable facilities, would be anything other than telecommunications services. Against this background, it would violate every recognized canon of statutory construction --and common sense -- to find that the insertion of the words “or use” in the 1996 Act was intended to radically alter the meaning of an otherwise plain statutory framework.

ii. Cable Modem Service Is A Telecommunications Service.

Just as it is clear that cable modem service is not a “cable service” under the Act, it is equally clear that cable modem service is a “telecommunications service” covered by Title II of the Act. As the court held in *Portland*, transmission of Internet access and other information services over cable facilities (i.e., “cable modem service”) falls squarely within the definition of “telecommunications,” which the Act defines as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or context of the information sent and received.” It is also plain that this form of telecommunications is being offered by cable companies as a “telecommunications service,” a term that the Act defines as “the offering of telecommunications for a fee directly to the public, or to such

classes of users as to be effectively available directly to the public, regardless of the facilities used.”

Cable modem service plainly satisfies both prongs of the “telecommunications service” definition. First, it is offered for a fee; cable companies do not give the service away. Second, it is offered to the public, as is evidenced by the mass-marketing advertising campaigns of the cable companies and the offering of the service to consumers at standard rates, terms and conditions.

EarthLink anticipates that cable interests will argue that cable modem service is not a telecommunications service because it is offered only in conjunction with “Internet access,” which the Commission has found is an “information service” that is regulated, if at all, only under the Commission’s ancillary jurisdiction pursuant to Title I of the Act. Thus, the argument would go, the cable modem telecommunications service is “contaminated” by the information service and should not be regulated. This argument, if made, is in direct conflict with over twenty years of Commission precedent. Beginning with its *Computer* decisions, and continuing through its *Frame Relay Order* and *Advanced Services Orders*, the Commission has ruled without exception that information services provided to the public are always provided over a common carrier transmission service.

In order for the Commission to accept the “contamination” argument (which the Commission has never applied to any facilities-based carrier), the Commission would -- in addition to disavowing over twenty years of Commission precedent -- have to reverse its explicit holding in its *Universal Service Report*, which acknowledged that Congress incorporated the

Commission's *Computer II* regime in the 1996 Act. In addition, the Commission would have to abandon entirely the concept of common carriage upon which the Communications Act is based, a concept just reaffirmed by the *Portland* court:

Under the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, "regardless of the facilities used."³

iii. Cable Modem Service Is Not Governed By Some "Third Regime" Under The Act.

The NOI poses the question of whether cable modem service is neither telecommunications service nor cable service, but instead is properly regulated under some as yet unidentified authority. The question is presumably based on the hypothesis that Congress was not aware that cable could be used to provide telecommunications service. Decker Anstrom, President of the National Cable Television Association, made sure that Congress did not harbor that misconception. In a 1995 Senate hearing, Mr. Anstrom said the following to Congress:

Put simply, if this committee wants to bring competition to the local phone monopoly, we are it. We are the other wire. Cable has the infrastructure, the technology, the expertise, and the desire to compete with the local phone industry.⁴

Numerous other cable industry representatives also testified before Congressional committees regarding their ability to compete in providing

³ *Portland*, 216 F.3d at 879.

⁴ *Telecommunications Policy Reform: Hearings before the Senate Committee on Commerce, Science, and Transportation*, 104th Cong.2 (1995), S. Hrg. 104-216 (emphasis added).

telecommunications services, and none ever suggested that they would be regulated under anything other than Title II or Title VI, depending on whether they provided telecommunications services or cable services. Most important, cable modem service plainly meets the definition of “telecommunications service,” and there is absolutely nothing in the Act to suggest that that definition should not apply just because the service is provided using cable facilities. To the contrary, a service meeting the statutory definition in section 3(47) of the Act (47 U.S.C. § 153(47)) is a “telecommunications service . . . regardless of the facilities used.”

2. The Law Requires That Cable Companies Provide Cable Modem Services To ISPs On Nondiscriminatory Terms.

Because cable modem service is a “telecommunications service” subject to Title II of the Act, facilities-based providers of that service are required by section 201 of the Act to provide that transmission service to ISPs and other information service providers on nondiscriminatory terms and conditions. This statutory requirement is the essence of open access, and it is the law today. The Commission would do a substantial service to the public and to the industry merely by acknowledging the existence of this statutory obligation, and EarthLink respectfully urges the Commission to make that acknowledgement without further delay as a first step in clarifying the obligations of cable modem service providers. As a second step, EarthLink requests that the Commission supplement its basic statement of the open access requirement by adopting more specific rules clarifying the actions that cable modem service providers must take to implement the same open access requirements that all other local facilities-based common carriers comply with today.

3. The Commission Should Not Exercise Its Forbearance Authority.

The Commission has asked, if cable modem service is a Title II telecommunications service, whether the Commission should use its section 10 forbearance authority to relieve cable companies from their common carrier obligation to provide this transmission service on a nondiscriminatory basis. The public interest and the future vitality of the Internet require that the Commission not forbear from applying the nondiscrimination requirement.

On the one hand, applying the same minimal requirements imposed by the Commission on all other competitive local exchange carriers would not constitute an appreciable burden. On the other hand, waiving the section 201 requirement that these facilities-based providers offer their transmission services on a nondiscriminatory basis would amount to a wholesale repeal of the concept of common carriage, a concept that is the fundamental underpinning of the Act. Such an action would be to the detriment of consumers and the public interest. Given that cable companies have conclusively demonstrated that they will make their transmission services available to ISPs only when forced to do so, there is no basis for the Commission to forbear under the theory that the “market” will lead to meaningful open access. EarthLink makes this statement advisedly, having recently negotiated an open access agreement with Time Warner Cable. Despite our sincere belief that that agreement will provide important benefits and increased service offerings to our customers, EarthLink is under no illusion that this single agreement, which was the result solely of regulatory pressure associated with the Time Warner/AOL merger, amounts to the open access that

the law currently requires. As such, this agreement provides no basis for the Commission to exercise its forbearance authority in this area.

4. Conclusion

The law is clear both that cable modem service is a “telecommunications service” and that carriers offering that service are currently required to provide that service to ISPs and other information service providers on nondiscriminatory rates, terms and conditions. EarthLink respectfully requests that the Commission act now to clarify that cable modem service providers must comply with these legal requirements.

INTRODUCTION

EarthLink, Inc. ("EarthLink"), by its counsel, hereby submits its comments in response to the Commission's September 28, 2000, Notice of Inquiry ("NOI") in GN Docket No. 00-185. EarthLink is the nation's second largest Internet service provider ("ISP") and serves over 4.5 million customers throughout the United States. EarthLink has from its inception received top marks for its quality of service and outstanding customer service.

Although the majority of Internet users currently employ traditional dial-up narrow-band transmission services to connect with the Internet, demand for broadband transmission services to provide high-speed Internet access has increased exponentially over the past two years, and broadband connections will soon overtake dial-up connections. Broadband is the future of the Internet.

More specifically, just as Internet customers generally are increasingly demanding broadband access, it is clear that customers prefer cable-based broadband access services over other broadband transport options. As the Commission reported in its October 31, 2000, release of data regarding high-speed Internet access, 84% of broadband access is provided over cable. In its 1998 filing before the Commission in the ATT/TCI merger, MindSpring Enterprises (which has since merged with EarthLink) stated that by a margin of 19 to 1 customers identified "change to cable modem" as the reason they were leaving MindSpring's service as opposed to "change to xDSL."⁵ EarthLink's experience over the past two years has been similar. Even now, EarthLink finds that the single biggest reason that customers leave the EarthLink service is to

⁵ *Comments of MindSpring Enterprises, Inc. In the Matter of AT&T Corporation and Tele-Communications, Inc. Application for Transfer of Control*, CS Docket 98-178 (filed October 29, 1998) at 5, fn. 8.

obtain a broadband service that we cannot yet provide in their area. Fully two thirds of those customers choose a cable-based broadband service. When these customer preference trends are combined with the tremendous rate of growth in broadband demand generally, it becomes clear that cable-based broadband is the dominant form of broadband Internet access.

Because of the phenomenal growth in demand for cable-based broadband Internet access services, the Commission is correct that now is the time to settle the question of what rules apply to cable modem services. Unless the Commission takes clear action – and soon – the expanding body of sometimes conflicting decisions by local cable franchising authorities, courts, and industry participants will undermine the Commission’s ability to provide the clear and consistent guidance needed in order to provide the public with a seamless, efficient, and high-quality transition to a broadband format. Accordingly, EarthLink applauds the Commission for issuing its NOI, and encourages the Commission to follow the comment period with prompt action.

As the Commission considers the comments of EarthLink and others, EarthLink respectfully urges the Commission to keep in mind two fundamental points:

1. The Commission must act promptly and decisively. As the Commission itself has suggested in the NOI, the proper regulatory treatment of cable modem services is rapidly becoming one of the most confused and regulatorily unwieldy issues before the Commission. The Commission is the body best equipped to act quickly to provide legal and regulatory certainty. In this regard, the “wait and see” approach taken to date by the Commission no longer serves the public or the industry. For the Commission to take no action

at this critical juncture is just as much a statement of policy, and will have the same degree of impact on the marketplace (albeit negative), as will an affirmative clarification of the proper regulatory treatment of cable modem services. Against this background, EarthLink respectfully and forcefully urges the Commission to answer definitively the regulatory questions that it has posed in the NOI. The most fundamental of these issues is whether cable modem service is a “cable service” or a “telecommunications service” within the meaning of the Communications Act.

2. The Communications Act and Commission and court precedent provide clear guidance as to the proper regulatory treatment of cable modem services. The cable industry and others have argued that cable modem service represents a new type of service that is fundamentally different from other telecommunications services. That argument is both factually and legally incorrect. As the Commission reads the comments below, the Commission should recognize that all of the regulatory issues identified in the NOI have been addressed either by Congress in the Communications Act (as amended by the Telecommunications Act of 1996), by existing Commission precedent, by court precedent, or by all three. In the sections below dealing with whether cable modem service is a cable service, a telecommunications service, or something else, we provide a detailed analysis of the statutory provisions and Commission and court decisions that provide an existing, appropriate, and statutorily valid approach to the proper treatment of these services. It is not necessary for the Commission to construct a new regulatory regime for cable modem services. To the contrary, such a regime would be contrary to Congressional decisions and intent. It is necessary only for the Commission to acknowledge and apply

existing law in order to resolve the issue and return some degree of certainty to the marketplace.

COMMENTS

I. CABLE MODEM SERVICE IS A TELECOMMUNICATIONS SERVICE, NOT A CABLE SERVICE.

The central, and indeed the controlling question posed by the NOI is whether cable modem service is a cable service regulated under Title VI of the Communications Act of 1934 (hereinafter, the “Act”), a telecommunications service regulated under Title II of the Act, an information service regulated only under the Commission’s ancillary jurisdiction under Title I of the Act, or a hybrid service regulated under multiple titles of the Act.⁶ As the discussion below demonstrates, there can be no reasonable doubt that cable modem service is a “telecommunications service” -- not a “cable service,” “information service,” or some hybrid service -- within the plain meaning of the Act, as amended by the Telecommunications Act of 1996.⁷

The NOI has adopted the term “cable modem service” as shorthand for the service under consideration. For the sake of clarity and consistency, EarthLink uses that term in these comments as well. However, EarthLink notes that the specific service to which these comments apply is the cable-based transport service used as a necessary input to provide the information service commonly referred to as “Internet access.” *See infra*, p.19.

⁶ NOI @ ¶ 15.

⁷ Public Law 104-104, codified generally at 47 U.S.C. 151 *et seq.* (1996) (the “1996 Act”).

Consistent with the sequence in which the Commission has discussed the issues raised in the NOI, EarthLink first addresses the question of whether cable modem service is a “cable service” and then discusses the proper classification of cable modem service as a “telecommunications service” and not an “information service” or hybrid service.

A. Cable Modem Service Is Not A “Cable Service” As Defined By The Act.

1. Internet Access is Not a “One-Way” Transmission.

Some of those opposed to a Commission acknowledgement that cable modem services are “telecommunications services” within the meaning of the Act have argued that such services are “cable services” that are subject to regulation under Title VI instead of Title II. Such a claim is in direct conflict with the language of the Act.

Section 602(6) of the Act (47 U.S.C. § 522(6)) defines “cable service” as follows:

- (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
- (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

One need read no further than the first four words of the definition to conclude that cable modem services are not “cable services” under the Act. The first mandatory characteristic of a “cable service” is that it is a “one-way transmission to subscribers.” EarthLink knows of no cable provider that asserts that its Internet access service consists solely, or even primarily, of a “one-way transmission to subscribers.” Indeed, the very nature of “Internet

access” is that it “gives users a variety of advanced capabilities” that “[u]sers can exploit . . . through applications they install on their own computers.”⁸ Users can only exploit those advanced capabilities through the two-way transmission of their own information, in the form of commands, requests for information, documents, and messages (e.g., e-mails and instant messaging); i.e., via the “telecommunications” that is an integral part of the definition of an “information service”⁹

2. The Courts Agree that Internet Access is Not a Cable Service.

In *AT&T v. City of Portland*, the Ninth Circuit Court of Appeals cogently explained why Internet access is not a “cable service” as defined in section 602(6) of the Act:

This definition does not fit @Home. Internet access is not one-way and general, but interactive and individual beyond the “subscriber interaction” contemplated by the statute. Accessing Web pages, navigating the Web’s hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming. . . . Thus, the communication concepts are distinct in both a practical and a technical sense. Surfing cable channels is one thing; surfing the Internet over a cable broadband connection is quite another.”¹⁰

The decisions of two other courts that have addressed this issue are not inconsistent with the Ninth Circuit’s analysis.

⁸ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536 ¶ 76 (1998)(emphasis added)(*Universal Service Report*).

⁹ 47 U.S.C. § 153(20).

¹⁰ 216 F. 3d 871, 876-877 (9th Cir. 1999)(*Portland*)(emphasis added) (ellipsis added)).

In *Gulf Power Co. v. F.C.C.*,¹¹ the Eleventh Circuit Court of Appeals also held that Internet access is not a cable service. In reaching its conclusion, the *Gulf Power II* court, like the *Portland* court, relied upon the “one-way” restriction in the definition of cable service. The court also concluded that Internet access is not a “telecommunications service,” a conclusion that the Commission itself has also reached numerous times. In so doing, however, the court did not consider whether or not the cable modem service at issue in this NOI is a telecommunications service. Instead, the court simply held that the Commission had not raised the argument that Internet access is a telecommunications service.¹²

In *MediaOne Group, Inc. v. County of Henrico*,¹³ the district court found that the Henrico county ordinance at issue was illegal for four independent (and in fact contradictory) reasons. The first reason cited for invalidating the county open access requirement was the correct one, namely, that the ordinance violated section 621(b)(3)(D) of the Act because implementation of the ordinance would “require MediaOne Virginia to provide telecommunications facilities.”¹⁴

¹¹ 208 F.3d 1263, 1276-1277 (11th Cir. 2000)(*Gulf Power II*). The Commission is seeking *certiorari* from the Supreme Court in this case with respect to the court’s interpretation on Internet access and other information services, as well as with respect to commercial mobile service providers.

¹² *Gulf Power II* at 1277. Neither Earthlink nor the Commission has ever said that Internet access or any other information service is a telecommunications service. However, as the Commission has frequently stated, information services are provided via telecommunications, and thus the cable modem platform services used to provide Internet access and other information services to the public are telecommunications services eligible for pole attachment privileges under section 224. This is an important clarification that Earthlink hopes the Commission will make should its request for *certiorari* in this case be granted.

¹³ 97 F.Supp.2d 712 (E.D. Va. 2000)(*Henrico*). This case is on appeal to the Fourth Circuit.

¹⁴ *Henrico* at 714.

This was so, the court correctly reasoned, because under the ordinance MediaOne would be providing “telecommunications” because it would be “forced to operate its cable modem platform to provide transmission between the points selected by requesting ISPs and their customers, without change in content.”¹⁵ This analysis is completely consistent with the analysis of the court in *Portland* and with the plain language of the statute, and provides sufficient grounds for overturning the local ordinance at issue in that case.

The court in *Henrico* then went on to list three other independent grounds for invalidating the ordinance. Each of these further grounds incorrectly assumed that a service is a “cable service” if the bundled service contains “news, commentary, games, and other proprietary content with which the subscribers interact, as well as Internet access”¹⁶ The court cites no support for its conclusion that bundling cable and non-cable services renders all of them “cable services.” In fact, for the reasons set forth herein, as well as those cited by the courts in *Portland* and *Gulf Power II*, this conclusion is clearly incorrect as a matter of law.¹⁷

In sum, both appellate courts to address the issue posed by the NOI held that Internet access is not a “cable service.” The district court in *Henrico* appears to have assumed that some part of the service involved was a cable service. This is not surprising in light of the fact that neither party argued

¹⁵ *Henrico* at 714.

¹⁶ *Id.* at 715.

¹⁷ See, e.g., H.R. Rep. No. 98-934, at 44 (1984)(“For instance, the combined offering of a non-cable shop-at-home service with service that by itself met all the conditions for being a cable service would not transform the shop-at-home service into a cable service, or transform the cable service into a non-cable communications service.”)

otherwise. The *Henrico* court did, however, properly hold that transmission for the purposes of Internet access is "telecommunications." All of these decisions are therefore consistent with EarthLink's conclusion in section B, *infra*, that cable facilities-based transmission used to provide Internet access is a Title II telecommunications service.

3. The Addition of "Or Use" By the 1996 Act Does Not Fundamentally Change the Definition of "Cable Service."

Recognizing that the "one-way" language in the statute precludes a plain reading argument for the proposition that cable modem service is a "cable service" under the Act, the cable industry has uniformly adopted the position that the 1996 Act's insertion of the words "or use" into subpart (B) of section 602(6) of the Act (47 U.S.C. § 522(6)) fundamentally changes the meaning of the statute. Through sheer poker-faced repetition, the argument has survived to make its way into the questions asked by the Commission.¹⁸ The time has come, however, for the Commission to put an end to this line of argument, because the argument cannot withstand even the most cursory analysis.

The "or use" language relied upon by the cable industry is found in subpart (B) of the statutory definition, where it modifies the phrase "such video programming or other programming service." As discussed above in section A.1., these are the video programming and other programming services that are defined in subpart (A) of the definition as being delivered through a "one-way" transmission. Since there is nothing "one-way" about Internet access, a plain-language analysis ends before one even gets to "or use."

¹⁸ NOI at ¶ 16.

Even if one were to ignore the “one-way” requirement, however, it is clear that cable modem service is neither “video programming” nor “other programming service.” The Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”¹⁹ EarthLink knows of no cable company that argues that cable Internet access is sufficiently like television programming to meet the definition of “video programming.”²⁰ Road Runner Internet access is not the same as the Road Runner cartoon.²¹

This leaves “other programming service” as the only possible category (again, ignoring for the sake of argument the “one-way” requirement) that could bring cable modem service within the definition of “cable service.” The Act defines “other programming service” as “information that a cable operator makes available to all subscribers generally.”²² The only information that a cable company or its affiliated ISP “makes available to all subscribers generally” is whatever proprietary content the cable company makes available through its

¹⁹ 47 U.S.C. § 522(20).

²⁰ See, e.g., *In the Matter of: Internet Ventures, Inc. and Internet On-Ramp, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3247, File No. CSR-5407-L, FCC 00-37 (rel. Feb. 18, 2000)(*IVI Order*). AT&T, the National Cable Television Association, and Time Warner Cable all seem to be in complete agreement on this point, arguing in their comments in the *IVI Petition* that Internet access clearly does not meet the definition of “video programming.” Time Warner Cable Comments on *IVI Petition*, p. 4 (“no serious claim is, or can be, made by IVI or any other ISP that the Internet, as a two-way, interactive service, is in any fashion comparable, from the consumer’s perspective, to the one-way video programming generally offered by broadcast stations in 1984”); AT&T Comments on *IVI Petition*, p. 9 (“This is not video programming at all, but rather access to content”); National Cable Television Association Comments on *IVI Petition*, p. 6-7 (“The Internet as a whole is hardly comparable to the programming provided by a television broadcast station.”)

²¹ In fact, the Commission has explicitly rejected the argument that Internet access could be considered “video programming.” *IVI Order* at ¶ 12.

²² 47 U.S.C. § 522(14).

home page. No matter how extensive this offering may be, however, it is an infinitesimal fraction of the information that is available over the Internet. All of the non-proprietary content that makes up the vast majority of the information flow over the Internet is chosen individually by the Internet user. The cable operator providing Internet access has no involvement in the creation or selection of that material (and, indeed, does not even know that it has been selected or transmitted), and certainly does nothing to provide such individualized information “to all subscribers generally.”

In addition, as the Commission in its *Portland* amicus brief and the court in *Gulf Power II* noted, the definition of “other programming service” has remained unchanged since it was first enacted.²³ Had Congress intended to include Internet access and other information services in the definition of “other programming service” it seems highly likely, given the extensive changes Congress made to the Act in the 1996 Act, including adding “information service” and “cable service” to the definitions in section 3 of the Act, that Congress would have amended the definition of “other programming service” to read “information services that a cable operator makes available to all subscribers generally.”²⁴ But Congress did not do so. Accordingly, cable modem service cannot be an “other programming service,” and the Commission should not interpret this minor amendment to “effectuate a major statutory shift.”²⁵

²³ *Commission Amicus Brief in Portland* at 23; *Gulf Power II* at 1277.

²⁴ See 47 U.S.C. §§ 153(7) and 153(20). The definition of “cable service” given in section 3(7) states that it has the same meaning as that term has in section 602 of the Act (47 U.S.C. § 522(6)).

²⁵ *Gulf Power II* at 1276.

a. Application of the Title VI Regime to Internet Access Leads to Absurd Results.

As the Ninth Circuit Court of Appeals in the *Portland* decision rightly pointed out, any attempt to include Internet access in the definition of “cable service” would produce a perverse result with respect to the application of many other provisions of Title VI. In particular, the court stated:

Further, applying the carefully tailored scheme of cable television regulation to cable broadband Internet access would lead to absurd results, inconsistent with the statutory structure. For example, cable operators like AT&T may be required by a franchising authority to set aside cable channels for public, educational or governmental use, *see* 47 U.S.C. § 531, must designate some of their channels for persons unaffiliated with the operator, *see* 47 U.S.C. § 532, and must carry the signals of local commercial and non-commercial educational television stations, *see* 47 U.S.C. §§ 534 & 535. We cannot rationally apply these cable television regulations to a non-broadcast interactive medium such as the Internet. As our sister circuit concluded in the context of the abortive “video dialtone” common carrier television technology, regulating @Home as a cable service “simply makes no sense in any respect, and would be infeasible in many respects. *National Cable Television Ass’n v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994).²⁶

As the analysis by the court illustrates, it is clear that the carefully constructed statutory scheme enacted by Congress for the regulation of cable services was not intended to encompass Internet access and other information services.

²⁶ *Portland* at 877.

b. The Legislative History Does Not Support the Cable Industry Argument that Cable Service Includes Internet Access.

It is hornbook law that where the plain words of a statute are unambiguous, it is unnecessary to turn to the legislative history or other extrinsic aids in seeking to interpret the statute.²⁷ That rule applies here with full force. The first mandatory characteristic of a “cable service” is that it involves “one-way” transmission of content. Internet access does not meet that criterion, and therefore may not be deemed to be cable service. This alone is the proper end of the inquiry. Even if one goes a step further, as discussed above, the definitions of “video programming” and “other programming service” preclude a determination that cable modem service is “cable service” under the Act. The cable industry argument thus fails under two independent avenues of analysis under the plain language of the Act.

Even if the plain language of the statute were somehow deemed insufficient to settle the question, the legislative history regarding the scope of the definition of “cable service” leaves no room for ambiguity. In the House Report accompanying the bill that became the Cable Act²⁸, the Committee stated:

All services offered by a cable system that go beyond providing generally-available video programming or other programming are not cable services. For instance, a cable service may not include “active” information services such as at-home shopping and banking that allow transactions between subscribers and cable operators or third-parties.

...

²⁷ See, e.g., *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)

²⁸ P.L. 98-549.

In general, services providing subscribers with the capacity to engage in transactions or to store, transform, forward, manipulate, or otherwise process information or data would not be cable services.

* * *

Some examples of cable services would be: video programming, pay-per-view, voter preference polls in the context of a video program, video rating services, teletext, one-way transmission of any computer software (including, for example, computer o[r] video games) and one-way videotex[t] services such as news services, stock market information, and on-line airline guides and catalog services that do not allow customer purchases.

Some examples of non-cable services would be: shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission o[f] non-video data and information not offered to all subscribers, data processing, video-conferencing and all voice communications.

Many commercial information services today offer a package of services, some of which (such as news services and stock listings) would be cable services and some of which (such as electronic mail and data processing) would not be cable services. While cable operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they choose, the manner in which a cable service is marketed would not alter its status as a cable service. For instance, the combined offering of a non-cable shop-at-home service with service that by itself met all the conditions for being a cable service would not transform the shop-at-home service into a cable service, or transform the cable service into a non-cable communications service.²⁹

This description of what Congress meant to include in -- and exclude from -- the definition of “cable service” in 1984 demonstrates that the sorts of interactive options that make up the typical use of the Internet are outside of the definition of “cable service.” Equally important, this description shows that the term “other programming service” has a meaning that is at once distinct from “video programming” and also far more limited than the expansive meaning that the cable industry would ascribe to it.

²⁹ H.R. Rep. No. 98-934, at 42-44 (1984)(emphasis added).

**c. The Cable Industry's Legislative History Arguments
Regarding the Meaning of "or use" Have No Merit.**

As noted above, the only change that was made to the definition of "cable service" in 1996 was the addition of the words "or use" in subpart (B) of Section 602(6) of the Act (47 U.S.C. § 522(6)). The cable industry seizes upon this change and argues that it was intended to alter radically what Congress did in defining "cable service" in 1984. In making this argument, cable interests have not made any argument based on the words of the statute. For the reasons cited above, it is difficult to imagine what such an argument might say. Instead, the cable industry relies entirely upon a single line from the legislative history of the 1996 Act regarding the addition of the words "or use" to the definition of "cable service":

The conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.³⁰

The most expansive statement of the "or use" argument of which EarthLink is aware consists of a single paragraph at pages 21-22 of the Joint Reply of AT&T and TCI in the AT&T/TCI merger proceeding.³¹ There, AT&T and TCI argued that:

Additionally, the 1996 Act expanded the definition of "cable services" – and thus the scope of cable's protection against treatment as a common carrier or utility – to include "interactive services," including information services and enhanced services. As the legislative history explains, this change reflects the evolution of cable services from the traditional one-way provision of video programming to include interactive services.

³⁰ S. Conf. Rep. No. 104-230, at 169 (1996) (*Senate Conference Report*); H.R. Conf. Rep. No. 104-458, at 169 (1996) (*House Conference Report*). The reports are identical and are hereinafter both referred to as "1996 Conference Report."

³¹ *In the Matter of Applications for Consent to the Transfer of Control of Licenses from TCI to AT&T*, Memorandum and Order, CS Docket No. 98-178, FCC 99-24 (rel. Feb. 18, 1999) (*AT&T/TCI Order*).

Under the expanded definition of “cable service,” Internet access and other advanced services are considered cable services if they are provided by a cable operator over a cable system.³²

Because the argument is short, it lends itself to a line-by-line analysis. Beginning with the first line of the quoted passage, EarthLink notes that it is simply inaccurate to say that the “1996 Act expanded the definition of ‘cable services’ . . . to include ‘interactive services,’ including information services and enhanced services.” As noted above, the only change in the statutory definition made in 1996 was the addition of the words “or use” in subpart (B) of the definition. The actual language of the Act, as amended in 1996, says nothing about either “interactive services” or “information services.” The cable industry argument, however, cites report language as though it were statutory language, which of course it is not. What the somewhat ambiguous sentence relied upon by the cable industry was intended to mean we may never know. What we do know is that the statute is clear, and that “an apparent congressional intent as revealed in a conference report does not trump a pellucid statutory directive.”³³

The second sentence of the quoted argument states that “this change reflects the evolution of cable services from the traditional one-way provision of video programming to include interactive services.” When one reads the Conference Report language cited, however, there is no mention of doing away with the “one-way” portion of the definition. Certainly, there is no mention whatsoever of changing the definition to include “two-way” transmission. As is the case with the first sentence of the argument, discussed immediately above,

³² *AT&T/TCI Joint Reply*, CS Docket No. 98-178.

³³ *City of Dallas, Texas v. F.C.C.*, 165 F.3d 341, 349 (5th Cir. 1999).

this second sentence not only reads more into the language than the language can bear, it also adds words that do not appear in the text.

The final sentence of the argument states that “Internet access and other advanced services are considered cable services if they are provided by a cable operator over a cable system.” (emphasis added) This is merely a conclusion, not an argument, and as such contains no logic with which to disagree. The sentence does, however, rely at least implicitly upon the premise that the identity of the service provider and the nature of the facilities used – not the nature of the services – controls the regulatory status of the service. This, of course, is directly contrary to the language of section 3(46) of the Act (47 U.S.C. § 153(46)), which defines “telecommunications service” as “the offering of telecommunications for a fee . . . to the public, regardless of the facilities used.” (emphasis added) As such, the final sentence of the cable industry’s “or use” argument directly contradicts the plain language of the statute.

d. The Commission is Already on Record Supporting the Conclusion that Internet Access is Not a Cable Service.

Applying some of the factors addressed above, it would appear that the Commission has already nearly reached the conclusion that cable modem service is not a “cable service” under the Act. As the Commission stated in its *amicus* brief in *Portland*:

On the other hand, notwithstanding the 1996 amendment, one basic aspect of the definition of cable service remains unchanged: A service cannot be a “cable service” unless it qualifies as “video programming” or “other programming service.” The 1996 Telecommunications Act did not alter the definitions of “video programming” or “other programming service.” Unless Internet access fits one of these definitions, it cannot qualify as “cable service.”

Proponents of the view that Internet access is a form of “cable service” generally do not argue that it is a form of “video programming” comparable to that offered by a television broadcast station (see 47 U.S.C. § 522(20)), but instead contend that Internet access fits the definition of “other programming service” -- that is, “information that a cable operator makes available to all subscribers generally.” 47 U.S.C. § 522(14). But it is not clear that Internet access meets this description. Arguably, the “information that an individual subscriber obtains via Internet access -- for example, E-mail or access to a specific web site chosen by the subscriber -- is provided only to that particular subscriber. In that respect, this information may not be made “available to all subscribers generally.”

AT&T and TCI appear to argue that a cable operator makes information “available to all subscribers generally” simply by providing subscribers with the capability to gain access to the Internet. Under this broad statutory interpretation, however, “other programming service” would arguably include any transmission capability that enables subscribers to select and receive information, including basic telephone service. And Congress stated that its 1996 amendment of the definition of cable service was not intended to eliminate the longstanding regulatory distinction between telecommunications service and cable service: “This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service.” Senate Conference Report at 169.³⁴

e. The Commission Should Declare That Cable Modem Service is Not a Cable Service.

In sum, the cable industry’s unfounded reliance on the addition of the words “or use” to the definition of “cable service” in 1996 simply has no basis either in the language of the section amended or in the overall structure of the Act. Both because the Commission has specifically requested comment on this argument³⁵ and because the argument has been used on a number of occasions to create an illusory legal ambiguity when none actually exists, EarthLink urges

³⁴ Commission *Amicus Brief* in *Portland* at 23, 24 (emphasis added).

³⁵ NOI at ¶ 16.

the Commission to reject this argument at its earliest opportunity in order to streamline any future consideration of the open access issue.

B. Cable Modem Service Is A Telecommunications Service.

1. Internet Access Consists of Two Related But Distinct Elements: An Information Service And A Telecommunications Service.

As demonstrated in section I.A., *supra*, Internet access and other information services provided over cable facilities are not “cable services” regulated under Title VI of the Act. We now turn to whether Internet access and other information services provided over cable facilities are provided using “telecommunications services” regulated under Title II of the Act. As we demonstrate below, there can be no doubt that they are.

At the outset, EarthLink wishes to be clear about which service we are attempting to classify under the Act. As discussed in more detail below, the Commission has determined on numerous occasions that Internet access and other information services are not “telecommunications services.” That does not mean, however, that the facilities used to provide those services are not telecommunications facilities, or that the service used to transport Internet access and other information services over those facilities is not a telecommunications service. The NOI has adopted the term “cable modem service” as shorthand for the service under consideration. EarthLink uses that term here as well for the sake of clarity. However, EarthLink notes again that the specific service to which these comments apply is the cable-based transport service used as a necessary input to provide information services, in particular the service commonly referred to as “Internet access.” This distinction is